

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #20cv8924
IN RE NEW YORK CITY POLICING :
DURING SUMMER 2020 DEMONSTRATIONS : New York, New York
----- : September 20, 2021
----- : TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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THE CLERK: This is In Re New York City Policing
During Summer 2020 Demonstrations, case number 20cv8924.
Will counsel please state their appearances for the record,
starting with plaintiff.

6

MS. SWATI PRAKASH: Good afternoon, this is Swati
Prakash with the Office of the New York State Attorney
General for plaintiffs People and the State of the New
York.

10

MS. MOLLY BIKLEN: And this is Molly Biklen of
the New York Civil Liberties Union Foundation for the Payne
plaintiffs.

13

MR. DOUGLAS LIEB: Douglas Lieb for plaintiff
Charles Henry Wood.

15

MR. ROB RICKNER: Rob Rickner, Rickner PLLC, for
the Sierra plaintiffs.

17

MX. REMY GREEN: Remy Green, Cohen & Green, for
the Sow plaintiffs, and I'll be speaking on the ESI
communication issues. For the reporter I should appear in
the transcript as Mx. Green, spelled M-X period rather than
Mr. or Ms.

22

MR. ANDREW STOLL: Andrew Stoll, Stoll, Glickman
& Bellina, for Cameron Yates. Good afternoon again.

24

THE COURT: For defendant.

25

MR. ANTHONY DISENKO: Good afternoon, again, Your

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2 Honor, this is Anthony DiSenso from the New York City Law
3 Department. I'll be speaking on the ESI portion of the
4 conference.

5 MS. STEPHANIE BRESLOW: Good afternoon, Your
6 Honor, this is Stephanie - sorry - this is Stephanie
7 Breslow from the City Law Department for defendants.

8 MS. DARA WEISS: And Dara Weiss from the New
9 York City Law Department.

10 THE COURT: Okay, we're going to do this over
11 again, and I should have started the other one by saying
12 that this is being recorded. Any rebroadcast or recording
13 of this proceeding by any other party is not permitted.

14 We have two issues, one relating to ESI and the
15 other relating to a 30(b) (6) deposition. As I said before,
16 I want to start with the ESI issue. And I think there's
17 two aspects to it: One is the timing and the other is the
18 methodology. I know that the plaintiffs are a little bit
19 at a disadvantage because the defendants, you know, appears
20 that the most complete statement about what's going on just
21 happened on Friday, but let's see what we can accomplish
22 now. So, Mx. Green, why don't you go ahead.

23 MX. GREEN: Sure, Your Honor, and as you said
24 before, we reset. I think the biggest problem, as far as
25 this goes, is that what's going on timing-wise is not even

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2 nominally compliant with the Court's schedule. You ordered
3 at docket 43 that the parties shall not require a deponent
4 to appear for a deposition after December 3. All motions
5 have to be made 30 days before December 31, and 11 weeks
6 from September 27, which is when they said they would be at
7 the earliest they will complete production, is mid to late
8 December. I'm sorry, it's just mid-December, it's December
9 13.

10 It's also not compliant with the schedule Judge
11 McMahon ordered. At docket 40 she specifically said if
12 it's necessary to shorten periods for responding to
13 discovery in order to meet the deadline, that should be
14 done.

15 So I mean I think the biggest question we have
16 is, you know, how do we get this done, and I think zooming
17 out a little bit, it's a problem we've had throughout the
18 case. I don't think that we are in a position to be
19 meeting the Court's schedule for any number of reasons.
20 You know, we bring as many issues as we can as quickly as
21 we can to the Court when we know that there are going to be
22 issues. But it's just - we are rolling towards disaster I
23 think. I don't know how to address it other than to say I
24 think what we care most about is timing, and, you know,
25 getting an expert opinion without emails is just not

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2 possible, let alone taking the remaining depositions
3 without them. So that's where I'll stop for now at least.

4 THE COURT: All right, Mr. DiSenso or whoever's
5 speaking for defendants.

6 MR. DiSENZO: Yes, Your Honor, this is Mr.
7 DiSenso. As we said in our letter on Friday, we recognize
8 the significant challenges that our estimate for review and
9 production poses in this case. I can say, you know, and
10 reiterate some of the points in the letter, that this is,
11 you know, we are anticipating and preparing for this to be
12 a very aggressive review schedule. A review team of 20
13 people, which is what we currently estimate hiring, is a
14 very large team. And we are trying to find a way to do
15 this as quickly and as efficiently as possible. That's one
16 of the reasons why we're planning on leveraging both a
17 managed review team and the use of technology assisted
18 review.

19 As far as why it's going to take so long I think
20 is a factor of the number of custodians we have here. We
21 have 50 custodians. That is a huge number of people to
22 collect from. And I realize that this is only for a fairly
23 short date range, but, you know, as you can see, 50
24 custodians still yielded over a million documents
25 collected. And we have been working for the past few weeks

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2 to come up with a way to come up with a way to deal with
3 that volume.

4 THE COURT: First of all, Mx. Green for some
5 reason measured your 11 weeks from the 27th. I measured it
6 from the 17th. What are you measuring it from?

7 MX. GREEN: Sorry, Your Honor, was that for me
8 or Mr. DiSenso?

9 THE COURT: No, that's for Mr. DiSenso.

10 MR. DiSENZO: Oh, I apologize, Your Honor. That
11 would be from the date of the Court conference I believe.

12 THE COURT: Meaning today.

13 MR. DiSENZO: Yes, Your Honor.

14 THE COURT: Okay. And just so I understand,
15 these 20 attorneys are contract attorneys that you're
16 hiring specifically for this case?

17 MR. DiSENZO: Yes.

18 THE COURT: And your expectation is, you're
19 assuming that you're going to get down to 100,000
20 documents, is that what it is?

21 MR. DiSENZO: That is our - it is - I will
22 emphasize this point that we believe - you know, it's very
23 hard to estimate a set number of documents when you're
24 using technology assisted review. We go based on estimated
25 on our sampling. We have a 95 percent confidence level,

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2 but there is a margin of error, but with a document set
3 this large that means that there can be some significant
4 variance in the number of documents we ultimately need to
5 review. And for that reason we've tried to take that into
6 account as much as we can in estimating that 11-week
7 timeframe. But it's --

8 (interposing)

9 MR. DiSENZO: It's hard for me to give you a
10 number of documents we will ultimately end up reviewing.

11 THE COURT: I mean we need to talk about the
12 timeframe. You're hiring these people as contract
13 attorneys. I certainly understand that you need to have
14 (indiscernible) again --

15 MR. DiSENZO: Yes.

16 THE COURT: -- and you need to have quality
17 control. I mean it sounds like if I take 11 weeks times 40
18 hours times 20 attorneys, I get something like, let's see,
19 8800 hours of attorney time. Did I do the math right?

20 MR. DiSENZO: Apologies, Your Honor, I will take
21 --

22 THE COURT: Some of the time is devoted, some of
23 the time is devoted to training, so I'm not saying you'll
24 use all that time. So if it was a week of training or
25 whatever, it would be 10 weeks times 40 hours times 20

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2 attorneys would be 8,000 hours.

3 MR. DiSENSO: I can provide a little bit more
4 detail in how that 11 weeks breaks down. Again, we're
5 anticipating here and again this is a very aggressive
6 schedule, you know, hiring and training a review team
7 within one week. And then we think that after that the
8 review will, the stages of the review will take
9 approximately seven weeks' worth of time for the review
10 team. There are numbers after that including the fact that
11 we need to validate that the review was successful in
12 finding responsive documents. That takes some additional
13 time.

14 We have some quality control that's not
15 necessarily related to the review team's review, you know,
16 coding documents correctly. But related to the fact that
17 there may be coding conflicts, you know, for example, a
18 document responsive in privilege but, you know, without a
19 privilege call on it. Given the volume, we estimate that
20 that would take an additional week. There are also a
21 number of holidays in between now and December that we have
22 to account for in that. And we also anticipate, and we're
23 factoring a time for actual production here, production
24 takes, you know, quite a bit of time when you're dealing
25 with this many documents. It's just machine time and also

1 PROCEEDINGS 11
2 QC time to make sure that the production was run correctly.
3 We anticipate that that would take between one and two
4 weeks.

5 THE COURT: Why does it take, why is that -
6 what's involved in production, I don't understand?

7 MR. DiSENSO: When we run --

8 THE COURT: I'm assuming you're not printing
9 this out. You're, you know, applying - I don't know what
10 you're doing to it. What does production mean?

11 MR. DiSENSO: So under the agreed-upon format
12 what we're doing is we are applying - and we're actually
13 essentially creating TIFF images of all of the emails and
14 the attachments and also creating an extracted text file
15 for each one of the documents we've produced for Excel
16 spreadsheets we're producing natively, but they're like not
17 the original native but a version of the native. We're
18 also producing various what are called DAT files which
19 allow basically the database to understand how to organize
20 and assemble document families and also provide metadata
21 associated with each of the documents.

22 You know, depending on the size, that can take
23 multiple days to actually generate that through just
24 machine time. We always build in more time because after
25 we receive it, we have to run quality control on it to make

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2 sure that it was run correctly, and if it was not run
3 correctly, it will have to go through that process over
4 again.

5 THE COURT: Mx. Green, did you have any - let's
6 put aside the time. In terms of the methodology of being
7 used here, is there anything to be said now or is that for
8 another time?

9 MX. GREEN: You know, Your Honor, I think, I
10 don't think any of this takes anywhere near as long as Mr.
11 DiSenso is suggesting. I think in terms of the methodology
12 I have no idea if, assuming that they're going to contract
13 attorneys, I have no idea why the number is 20. Right? If
14 that's the biggest slowdown here, why aren't they hiring a
15 hundred attorneys? The math doesn't quite work out for me
16 either, right, as you said it's 8800 attorney hours if you
17 run their calculation, and with the review population
18 they've suggested, that suggests that an attorney is only
19 getting through 25 documents in an hour. Most people as a
20 rule of thumb use 100 documents per attorney per hour. So
21 the math seems a little wrong.

22 THE COURT: Well, just in fairness, I assumed
23 all 11 weeks were attorney review time, and I think they --

24 MX. GREEN: Yeah, that's --

25 THE COURT: -- made clear that that's not the

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2 case.

3 MX. GREEN: Yeah. I also, you know, it doesn't
4 seem to me that there's any reason, as Mr. DiSenso
5 suggests, that a rolling production should slow anything
6 down. After all, it's just machine time. Right? They put
7 it on the machine, it produces, that shouldn't slow down
8 the review.

9 But I think, you know, the biggest objection we
10 have is, as many documents as, you know, half a million or
11 250,000 as the meaningful review population relative to,
12 you know, zero documents, relative to major cases it's
13 nothing. Right? Like a typical white collar investigation
14 has millions if not hundreds of millions of documents, and
15 firms get through those on much more aggressive schedules
16 than this regularly every day. And it's, you know, the
17 idea of getting through a quarter of a million documents
18 takes, it's taken them, you know, two months since we
19 agreed on a protocol plus another three months is just,
20 it's absurd.

21 And so on the methodology I think they've made a
22 choice to say 20 attorneys. I don't know why they've made
23 that choice. And that's probably the biggest objection we
24 had.

25 THE COURT: Well, okay, so there's two issues,

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2 Mr. DiSenso. One is I'm not sure that you're the right
3 person to address it which is why it took until now to get
4 to this point. But the second one is why 20 attorneys and
5 why not double that and then that would significantly
6 shorten the time.

7 MR. DiSENZO: The reason for 20 attorneys, and I
8 will say, reiterate my earlier point, which is that 20
9 attorneys is a very aggressive number of document
10 reviewers. It is because we need to balance the number of
11 documents reviewed per day against what the case team can
12 QC. And, you know, as it stands right now, this is
13 aggressive not because of the number of attorneys we're
14 necessarily hiring, it's aggressive because of the burden
15 that it puts on the case team on a daily basis to review
16 the work of those attorneys.

17 I must say we have to do that especially where
18 we're leveraging technology assisted review because it's
19 important for us and for the review process to ensure that
20 the reviewers are coding documents correctly. We don't
21 want to be in a position where we're not doing adequate QC
22 because we have a hundred reviewers going at once, and then
23 we discover down the line that, you know, they're, they
24 missed a whole bunch of documents that should've been coded
25 responsive. So that's the reason why we are, you know,

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2 proposing 20 attorneys or at least thinking about 20
3 attorneys now.

4 If I may, Your Honor, just to address another
5 point that was raised, as far as rolling productions go,
6 the reason why that could slow things down is because it's
7 not just a factor of sending a production to the vendor and
8 to have it run, and it's just not machine time. There's a
9 number of steps which I outlined in my initial breakdown
10 that go into readying a production set. So that includes,
11 you know, coding, QC, cleanup. That includes cleanup and
12 QC of the production process. It also necessitates that we
13 take resources away from QC-ing in order to deal with those
14 coding QC issues. Based on how the review is set up, it
15 may require us to kind of pause the review while we ready a
16 production set. So that's kind of where that thinking
17 comes from, and it is based on our past experience with
18 similar models.

19 THE COURT: How many attorneys in the law
20 department are doing this quality review you're talking
21 about?

22 MR. DiSENZO: You know, I think that's still
23 being determined, but it is I believe four is what we
24 anticipate.

25 MS. WEISS: Your Honor, if I may, this is Dara

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2 Weiss. We have four as of now and we're working on getting
3 a fifth. And I just want to add this is work that is going
4 to be done in the evenings after hours. This is work that
5 is going to be QC'd after the review team has done their
6 work for the day, so these attorneys then have to log on at
7 night to review their work.

8 THE COURT: I mean I guess that's admirable, but
9 couldn't they log on the first thing the next morning and
10 have essentially, you know, why does it have to be done at
11 night?

12 MS. WEISS: Well, then it would have to be done
13 before the review team starts their work at, I don't know,
14 Anthony, whatever time the team starts work --

15 THE COURT: Oh, I see, you're giving them
16 directions that would apply instantaneously, is that the
17 point?

18 MR. DISENKO: That's correct, Your Honor, and
19 that's very important, especially where, at the beginning
20 of a review and when we're using technology assisted review
21 because we want to catch at the earliest part, point
22 possible any confusion with what is relevant and make sure
23 it's corrected so that we don't have to review large
24 portions of the review.

25 MX. GREEN: Your Honor, if I may, a lot of this

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2 seems like, you know, perfect world type stuff. I am a
3 little baffled by the use of technology assisted review
4 here. This just isn't, I don't think the volume of
5 documents where that pays off. It really - and I also find
6 it kind of shocking the number of attorneys who are able to
7 QC even after the Court has, I think, repeatedly told
8 defendants they need to staff the case more robustly.

9 But it's, you know, I think that the answer to
10 your question is obviously people should just be doing it
11 during the day, and, yes, you usually have to redo the
12 first part of a review, that's kind of normal in big
13 document reviews. But, you know, I don't think attorneys
14 working in the evening should be the hurdle here.

15 THE COURT: Well, I don't think it's being
16 presented as a hurdle. Maybe you feel the number is a
17 hurdle. I'm not sure that having five attorneys do this
18 from the law department and 20 attorneys contracted is out
19 of line with what might be expected in terms of staffing.
20 I think it's unfortunate we've gotten to this point because
21 I think we could have moved a lot quicker. I don't want to
22 start assigning blame as to how we got there.

23 But here's where I think we should be right now.
24 I've consulted with Judge McMahon about this, and I'm
25 authorized to provide an appropriate extension of the

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2 various deadlines so that we can make sure this happens.
3 I'm not sure I want to just announce right now and say what
4 that is. I think it's been a big hiccup between the
5 parties because I don't think there's no way to start, you
6 know, when one side says, oh, I should order it produced
7 next week and the other side says not for 11 weeks, it
8 leaves no room for compromise. I understand from the
9 plaintiffs' point of view, because they need it, you know,
10 pretty soon if they're going to do all the things that they
11 need to accomplish by the end of December. I'm not sure
12 they would need it in one week, but they, you know, need it
13 in a matter of just a few weeks at most.

14

So if I can loosen that stricture, and I said I
will loosen that stricture, what I think I want to have
happen is I would like to have a more serious discussion
between the parties to talk about a realistic deadline for
the ESI that would allow for the remaining tasks, being the
experts and, you know, discovery of key individuals who
might be implicated by the ESI, to have that happen after
it would get produced.

22

It's really important that the Law Department be
forthcoming about what they're doing and how they're doing
it because I don't want to have a situation where you make
some decision early on about relevance or something else

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2 and about how TAR algorithm needs to be pointed, and then
3 it turn out that you made some decision that I later found
4 out was unreasonable and we've lost tons of time because of
5 that.

6 So knowing that we can do something on the
7 timing, and that would apply obviously to the expert report
8 and the class certification, I feel like that that should
9 be an impetus to, if not coming to an agreement, at least
10 someone giving me a more realistic proposal from the
11 plaintiffs' side if they can't come to agreement with the
12 defendant about what can be done and what should be done.
13 I'm not sure I buy the idea that 20 attorney is the wrong
14 number, and, you know, depending upon a lot of other
15 factors here, but it's really all dependent on the City
16 being very forthcoming with the plaintiffs as to how
17 they're doing this, how they're staffing it, and what
18 decisions should be made. I shouldn't have to issue orders
19 telling the City to provide this information. The City
20 should be very forthcoming about this.

21 So having said this, Mx. Green, I think you can
22 read that I don't want to pick that date now. I suppose
23 I'm open to a request to do that, but tell me if you have
24 some thoughts having heard what I said.

25 MX. GREEN: Yes, Your Honor. I think, you know,

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2 it's hard to say what we need without knowing what
3 extension we're going to get, but I understand exactly why
4 you might not want to tell us right now. And certainly I
5 am happy to go discuss something that is a little less than
6 a week from the conference, especially given that, you
7 know, rather than - when we wrote that, I think we had in
8 mind that they might try to get ahead of it by starting
9 review while the motion was pending. But, of course, we're
10 willing to go and talk about it.

11 I think one - a couple of things that will help
12 us address this, in a meet and confer we've had today and a
13 number of meet and confers we had last week, you know,
14 whenever we ask for basic information about how the City is
15 searching for things and that sort of thing, they've
16 started saying that we don't think it's appropriate for
17 them to be discussing it with us. And they say, you know,
18 that's discovery on discovery and wildly inappropriate, and
19 they shut down. And obviously that isn't going to work.

20 I think the right thing to do might be for
21 defendants to provide status letters that they file on the
22 docket, and that way, you know, we can all make sure that
23 things are going the right way, and we don't have to
24 necessarily, you know, fight with them about what's
25 confidential because they've been designating staffing as

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2 confidential every time they tell us about it.

3 THE COURT: All right, who's going to speak - I
4 normally have one attorney per issue, but I understand I'm
5 now raising things beyond just mere ESI technicalities. So
6 whoever wants to speak from the Law Department.

7 MS. WEISS: Yes, Your Honor, this is Dara Weiss.
8 I strongly disagree with any thought of providing status
9 letters, especially filed on the docket. A lot of what
10 ends of taking the time of the attorneys for the defendant
11 is things like writing letters and participating in meet
12 and confers and responding to letters that plaintiffs
13 write, and that takes us away from the tasks of providing
14 the discovery and getting them the information that they
15 need.

16 And what we were opposed to in the meet and
17 confers that Mx. Green spoke about before was not providing
18 statuses of where we are in discovery but providing details
19 of exactly what our clients have done in the process of
20 searching for certain documents which is what defendants
21 think is inappropriate. But a matter of providing
22 plaintiffs with the status of where we are in searches and
23 how long we think it might take us to provide them with
24 things such as these emails that we're searching for now or
25 plaintiffs pointed out that there appear to be some

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2 documents that weren't provided, you know, providing the
3 status of looking for those documents or status of finding
4 and naming proper 30(b) (6) witnesses and where we are in
5 the process of getting that done, that's absolutely fine.
6 We have no problem with providing that information to
7 plaintiffs.

8 But things like filing status reports on the
9 docket I think is unnecessary and inappropriate.

10 THE COURT: Filing on the docket is not my
11 issue. What's important, particularly for the ESI process,
12 you know, 30(b) (6) is its own thing, but for the ESI
13 process this has to be transparent. They have to, and
14 maybe you want to develop a template when you finally
15 figure out the precise process as to how many documents got
16 reviewed or whatever it is. That is easily filled in. I
17 assume you're going to keep track of this yourself in some
18 way. I'm not trying to burden you. But the ESI process in
19 particular is a break from the way things were done in the
20 past when people just presented documents after they've
21 done a search. The plaintiffs have to be part of that
22 process and have to understand when choices get made that
23 might affect them and also might affect the timing,
24 particularly given that we're in a crunch when it comes to
25 timing.

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2 So I'm not going to require it to be filed on the
3 docket, but I almost think it would be better for you to
4 have a template, you know, for the ESI process that you do
5 once a week. I think it might spare you questions. I
6 don't want to start ordering - the only thing I'm going to
7 order is what I already did which is that you have to be
8 completely forthcoming on this. This is a way to avoid
9 discovery on discovery. This is not discovery on
10 discovery. Attorneys telling the other side about the ESI
11 process is normal. And if you end up not being forthcoming
12 about it, then I might have to order discovery on discovery
13 which I think would be a disaster for you. So this is a
14 way to forestall that.

15 So, Ms. Weiss, having said that, is there a
16 reaction?

17 MS. WEISS: That sounds reasonable and easier
18 for both sides. I have to admit that I am by far not an
19 expert on the e-discovery process in this office, so I
20 don't know how it's usually done in the usual scope of a
21 litigation, but that is why we have an e-discovery team.
22 So I will certainly work with them to make sure that this
23 office is transparent in the rest of the e-discovery and
24 email collection and production process.

25 MR. DISENKO: Your Honor --

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C E R T I F I C A T E

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I, Carole Ludwig, certify that the foregoing
transcript of proceedings in the United States District
Court, Southern District of New York, In Re: New York
Policing During Summer 2020 Demonstrations, docket
#20cv8924, was prepared using PC-based transcription
software and is a true and accurate record of the
proceedings.

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Signature Carole Ludwig

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Date: September 23, 2021

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